1992

Albertsons, INC v. Board of Review of the Industrial Commission : Reply Brief

Utah Court of Appeals

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Winston M. Faux; Assistant Attorney General; Attorney for Board of Review; Gayle M. Fullerton.

UTAH COURT OF APPEALS

ALBERTSONS, INC., an Idaho corporation	:	Case No. 920530-CA
Petitioner,	:	
v.	:	
BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION,	:	Priority No. 7
Respondent.	:	

REPLY BRIEF OF PETITIONER

PETITION FOR REVIEW OF THE
BOARD OF REVIEW OF THE UTAH INDUSTRIAL COMMISSION,
UNEMPLOYMENT INSURANCE DIVISION,
STATE OF UTAH

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SUMMARY OF ARGUMENT

Contrary to the arguments raised in the Respondent's Brief, evidence of Claimant's insubordination was not raised for the first time on appeal and should not be disregarded by this Court. Specifically, evidence of the Claimant's threats to co-workers was raised in the hearing before the ALJ, referred to in Albertson's letter of appeal and considered by the Board of Review. The Court, therefore, should not disregard the Petitioner's argument regarding insubordination, threats and quarreling with co-workers.

The Claimant's action was not an isolated, unintentional act and constitutes grounds for immediate discharge. The record is replete with evidence of the Claimant's intentional destruction of company property. Even if this Court is only free to consider the April 2, 1992 incident, such a single violation of willful abusive conduct is sufficient to demonstrate employee culpability.

The Board of Review's factual finding is not rationally based upon substantial evidence. The Board of Review and the ALJ acted unreasonably and irrationally by unduly crediting Mr. Fullerton's inconsistent and incredible testimony in light of not only Mr. Ellis' unbiased testimony, but also in light of the overwhelming evidence to the contrary provided by Darrell Kidd, Scott Bradshaw, and the Claimant's own inconsistent statements. For these reasons and those set forth in the Brief of Petitioner,

this Court should reverse the unreasonable findings of the Board of Review and deny the benefits sought by the Claimant.

ARGUMENT

POINT I

EVIDENCE OF CLAIMANT'S INSUBORDINATION WAS NOT RAISED FOR THE FIRST TIME ON APPEAL AND SHOULD NOT BE DISREGARDED BY THIS COURT.

Evidence of Fullerton's insubordination, threats, quarreling and disrespect to co-workers may in of itself be sufficient evidence to warrant discharge. Despite the Respondent's assertion to the contrary, evidence of Fullerton's insubordination, threats, quarreling and disrespect to co-workers was raised and considered in the hearing before the ALJ. Testifying before the ALJ, Mr. Earl Ellis stated:

> It was early morning, I was working graveyard shift at the time. He walked in to ask for a battery change, and I told him I would be right there. I got up and wiped my hands to walk out, by that time he'd already pushed the other battery back in. He had trouble putting the retaining plate in and started beating on the machine. I asked him to stop; he wouldn't stop. I told him, I said, "You break that cover, I'm going to have to turn you in." His response was, "I don't give a shit, go ahead and turn me in. It will be the last thing you ever do."

R. 0032

The employer initially argued that Fullerton was discharged for not following a reasonable policy, rule or instruction from the employer. Likewise, the Utah Department

of Employment Security Division expressly stated that the Claimant was discharged for disqualifying just cause. Subparagraph 7 of the company policy sheet (identified as Exhibit 4 in the hearing before the ALJ, and submitted into evidence before the ALJ) R. 0008 lists "Quarreling or fighting with other employees" as cause for immediate dismissal. The record reflects that evidence of such conduct was presented to the ALJ. Such evidence was expressly included in the ALJ's Findings of Fact. R. 0055-56.

The issue of quarreling, threats and insubordination was also raised by Robert F. Watson, in his letter of appeal to the Board of Review. Mr. Watson stated "...the claimant also threatened Mr. Ellis if he did turn him in, and proceeded to strike the equipment again..." R. 0065 (A copy of the Robert F. Watson letter is attached hereto.) It is clear from the record that the evidence of threats, vulgar language and insubordination was also considered by the Board of Review. (R. 0083 referencing Mr. Ellis' testimony cited above.). The Respondent correctly asserts that matters raised for the first time on appeal should not be considered by this Court on appeal. See, Mascaro v. Davis, 741 P.2d 938 (Utah 1987). However, this is not the first time that the issue of insubordination, threats and quarreling have been raised in this matter. A matter is sufficiently raised that it may be raised on appeal if that matter has been submitted to the trial

court and the trial court has had an opportunity to make findings of fact or law. James v. Preston, 746 P.2d 799 (Utah App. 1987).

The Appellant's review of Utah case law holding that appellate courts will not hear issues raised for the first time on appeal reveals that no such cases have involved administrative hearings such as the one at issue here held before the Industrial Commission. Such hearings are unique in that they do not generally generate the type of pleadings associated with regular trials. That is, there are generally no trial briefs, jury instructions, motions in limine, or similar pleading wherein issues may and should be raised. Generally, the only way issues are raised in such administrative hearings is if they are brought to the attention of the ALJ during the hearing. Such was the case in this matter with regard to evidence of insubordination, threats and quarreling, as is evidenced by the ALJ's findings of fact. For these reasons, the Court should not disregard the Petitioner's argument regarding insubordination, threats and quarreling with co-workers.

POINT II

CLAIMANT'S ACTION WAS NOT AN ISOLATED, UNINTENTIONAL ACT AND CONSTITUTES GROUND FOR IMMEDIATE DISCHARGE.

The record is replete with evidence of the Claimant's intentional destruction of company property. Petitioner's

brief identifies the fact that Fullerton was earlier suspended for willful destruction of company property on January 31, 1990. He was also suspended for unsafe operation of equipment on April 19, 1989. R. 0009. Even if this Court is only free to consider the April 2, 1992 incident in a vacuum, any such single violation of willful abusive conduct is sufficient to demonstrate employee culpability. See, Kehl v. Board of Review, 700 P.2d 1129 (Utah 1985) discussed more fully in the Petitioner's brief. Additionally, company policy expressly states that willful destruction of company property or quarreling with co-employees constitute grounds for immediate dismissal.

POINT III

THE BOARD OF REVIEW'S FACTUAL FINDING IS NOT RATIONALLY BASED UPON SUBSTANTIAL EVIDENCE.

Respondent defines the issue on appeal as whether there is "substantial evidence in light of the whole record to support the Board of Review's findings." However, the Respondent incorrectly portrays the Petitioner's argument as merely a weighing of "the relative credibility of the testimony of Mr. Ellis and Mr. Fullerton." The Board of Review and the ALJ acted unreasonably and irrationally by unduly crediting Mr. Fullerton's inconsistent and incredible testimony in light of not only Mr. Ellis' unbiased testimony, but also in light of the overwhelming evidence to the contrary provided by Darrell Kidd, Albertson's warehouse operation's manager, Scott

Bradshaw, the perishable superintendent of Albertson's, and Mr. Fullerton's own inconsistent statements.

The ALJ places much emphasis upon the fact that Mr. Ellis could not see the Claimant's feet for a brief moment, when the Claimant claims to have been standing on the rollers and slipped, accidentally hitting the equipment. R. 0055. While Mr. Ellis states that for a moment he could not see the Claimant's feet. R. 0051. Ellis also testified that he earlier saw the Claimant standing on the rail, not the rollers, and striking the equipment. R. 0031. Not only does Mr. Ellis contradict the Claimant's statement that he was on the rollers, but Darrell Kidd, based upon his experience and Fullerton's experience, likewise stated that he could not understand why anyone would stand on the rollers to move the battery. R. 0047.

Similarly, the Claimant stated that he could not wait for help from Ellis to change the battery, because he had a "quota to keep" so he tried to change it himself. R. 0040. Mr. Kidd testified that the perishable day shift forklift operators do not have a quota R. 0046 and that employees have been instructed never to change the batteries by themselves. R. 0046-47.

Despite Mr. Ellis' testimony that he watched the Claimant beat on the equipment at a time the Claimant was not standing on the rollers R. 0032 the ALJ accepted the Claimant's version that his feet accidentally slipped on the

rollers. The ALJ's conclusion is unreasonable and not based upon substantial evidence when considered, not just against Mr. Ellis' testimony but against Mr. Bradshaw's testimony and against Mr. Fullerton's own contradictory statement. The Claimant had earlier stated that the equipment was damaged when it had slipped out of his fingers. R. 0037-38. The Respondent is incorrect in stating that "the record. . .reflects that the critical elements of the Claimant's account have remained constant." When first questioned about the incident, by Mr. Bradshaw, Ellis denied any involvement. R. 0037. Then, after being told of Ellis' statement, the Claimant claims the equipment was damaged because it had grease on it and slipped out of his fingers. R. 0037-38. Lastly, the Respondent argues that the equipment was damaged when he slipped and fell on the rollers banging the equipment. It was unreasonable for the ALJ and for the Board of Review to accept such inconsistent testimony in light of substantial evidence to the contrary.

CONCLUSION

The record reflects that evidence of the Claimant's insubordination, threats and quarreling with co-workers has been raised and considered from the beginning of this case and should be considered by this Court in making its determination of whether the Claimant was properly terminated for cause.

Despite the Respondent's assertions to the contrary, the Claimant's action was not an isolated, unintentional act and thus, constitutes grounds for immediate discharge. Even if the incident is considered in a vacuum, such a single violation of willful, abusive conduct is sufficient to demonstrate employee culpability.

The Board of Review's findings are not supported by substantial evidence when viewed in light of the whole record before the Court. It is not simply a matter of weighing the testimony of Mr. Ellis and Mr. Fullerton. The ALJ and the Board of Review unreasonably failed to credit the testimony of other disinterested witnesses and to take into account the Claimant's own contradictory statements. The Appellant's evidence on the record clearly establishes the employee's culpability, knowledge and control. For these reasons, the Court should reverse the unreasonable findings of the Board of Review and deny the benefits sought by the Claimant.

DATED this 4th day of February, 1993.

PRINCE, YEATES & GELDZAHLER

By _____
Roger J. McConkie
Attorneys for Petitioner

MAILING CERTIFICATE

I hereby certify that, on the 4th day of February, 1993, I caused to be mailed, postage prepaid, one (1) original and seven (7) true and correct copies of the foregoing REPLY BRIEF OF PETITIONER to:

Court Clerk
Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, UT 84102

and two (2) copies to the following:

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7669 South Sunrise Place
West Jordan, UT 84084

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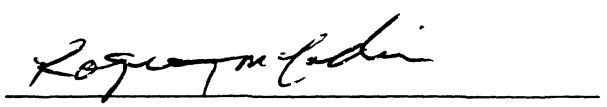

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ADDENDUM

IX. ATTENDANCE, STATUS AND PAY:

1. Due to the perishable nature of many of the commodities, and in order to prevent spoilage and to meet delivery and production schedules, all employees must report to work as scheduled.
2. When unable to report to work, call in sufficiently in advance of the shift to enable your supervisor to provide a replacement Absence without advising your supervisor or manager will be considered as voluntary resignation.
3 Report to work on time. Record all time worked on your time card. Employee must review and agree to comply with the Company's stated Time Clock Policy and Procedures.
4. It is your own responsibility to keep informed of when you will be expected to work. Work schedules will be posted near the time clock.
5 Advise your immediate supervisor promptly of any change in name, address, telephone number, marital status, or number of dependents, so the Company and Internal Revenue records may be kept current.

X. CAUSES FOR IMMEDIATE DISMISSAL:

The following acts will not be tolerated and will be considered sufficient cause for immediate discharge:

1. Drinking intoxicants, or the use or possession of any illegal stimulant, depressant, or hallucinogenic substance, on Company premises at any time, whether on or off shift, or reporting to work under the effect of intoxicants, or any illegal stimulant, or hallucinogenic substance.
2. Excessive tardiness, or absence without proper reason or notice to management.
3 Proven immoral or illegal behavior on Company premises.
4. Any fraudulent act or statement directly related to Company business.
5 Excessive wage attachments or harrassment of the Company by your unpaid creditors.
6. Unauthorized possession of or damage to Company funds, property, or merchandise.
7. Quarreling or fighting with other employees.
8. Mishandling of Company funds or property. Any employee willfully damaging Company property, or breaking and/or removing from the Company premises, any merchandise for the purpose of eating or pilferage, will be subject to immediate termination. All merchandise leaving the warehouse or plant must be accompanied by an invoice.
9. Gambling on Company property.
10 Insubordination, falsifying records, disclosing confidential information, or any other act constituting willful disregard of the Company's best interest.

XI. BONDING: All employees must be bonded The premium involved shall be paid by the Company. In the event the Company's regular bonding company refuses to give bond to any employee for any reason, then and in that event, the employee will be subject to immediate termination.

XII. CHAUFFEUR'S LICENSES: All driver-warehousemen will be required to have a valid Chauffeur's License in the states where they are required and for the state where the plant or distribution center is located, within fifteen (15) days after they are employeed. After fifteen (15) days of employment, all driver-warehousemen must at all times have a valid Chauffeur's License. The license must be carried with them at all times. No exceptions will be made.

XIII. PASSENGERS No driver-warehouseman will allow anyone, other than employees of the employer who are on duty, to ride on his truck. This will not prohibit the driver-warehouseman from picking up other drivers, helpers, or others in wrecked or broken down motor equipment and transporting them to the first available point of communication, repair, lodging, or available medical attention.

XIV. COMPANY IMAGE: All actions by employees reflect upon the image of Albertson's, Inc., and in your dealings with the public, you should at all times conduct yourself in a manner that is beyond reproach. This includes being cautious of your actions in public, your dress and personal appearance, driving habits, language, etc.

I hereby certify that I have read and understand the above Distribution and Manufacturing policies; and that in connection with the application for employment with, continued employment by, or advancement with Albertson's, Inc., I have been advised through receipt of this form that:

1. An investigative consumer report as to my character, general reputation, personal characteristics, and mode of living may be made and,
2. I have the right to make a written request within a reasonable time for a complete and accurate disclosure of the nature and scope of the investigation requested.

I also acknowledge that any report or other information required by Federal or State law now or hereafter in affect, shall be deemed received by me if addressed to me at my last known address.

Signature _____ Witness by Supervisor Francene Montgomery

Distribution Center or Plant 7231 Date 4-8-81

Original - Personnel File *1st Copy - Employee* *2nd Copy - Employees Performance Record Folder*

000008

EXHIBIT 4

Albertsons®

April 19, 1989

TO: Gayle Fullerton

FROM: Kirk Hansen

SUBJECT: SUSPENSION (UNSAFE OPERATION OF EQUIPMENT)

You are hereby placed on a disciplinary suspension without pay beginning April 20, 1989. You are to report to work at your regularly scheduled time April 25, 1989. This suspension is due to your unsafe operation of equipment. Any further incidents of this nature will result in termination.

EMPLOYEE Gayle Fullerton

WITNESS

EXHIBIT 5

UDGE Okay. And do we need to call Mr. Ellis?

ENDERSON Yes. He witnessed the final incident.

UDGE Okay. Thank you. Be right back. (OFF RECORD)

We're back on record. No testimony was taken or given during the time that we were off record. I left the room to get Mr. Ellis to testify. Would you agree, sir, that that's what occurred?

SPENCER Yes.

JUDGE Thank you. Would you agree, Ms. Henderson?

HENDERSON Yes.

JUDGE Thank you. Been called to testify, Mr. Ellis. Would you raise your right hand to be sworn.

OATH ADMINISTERED. Mr. Ellis answered in the affirmative.

Thank you, sir. If you'd state your name and position with the company.

ELLIS Earl Layne Ellis, Maintenance.

JUDGE And the company for which you work is Albertsons.

ELLIS Albertsons Distribution.

JUDGE And how long have you been with them?

ELLIS Three (3) years.

JUDGE And in your capacity did you work with Mr. Fullerton?

ELLIS As changing batteries for him, yes, I did.

JUDGE Okay. And is there something that you observed, then, with respect to a forklift in April?

ELLIS A reach (?) truck, yes.

JUDGE A what kind of truck?

ELLIS Reach truck.

JUDGE Reach truck. Okay. When did this occur?

ELLIS It was early morning, I was working graveyard shift at the time. He walked in to ask for a battery change, and I told him I'd be right there. I got up and wiped my hands to walk out, by that time he'd already pushed the other battery back in. He had trouble putting the retaining plate in and started beating on the machine. I asked him to stop; he wouldn't stop. I told him, I said, "you break that cover, I'm gonna have to turn you in". His response then was, "I don't give a shit, go ahead and turn me in. It'll be the last thing you ever do".

JUDGE And what happened?

ELLIS He beat on it a couple more times then--then left.

JUDGE Did it break?

ELLIS Yes, it did.

JUDGE Okay. Then what did you do?

ELLIS As soon as my supervisor came in, I reported the incident.

JUDGE Okay, thank you. Ms. Henderson.

HENDERSON Yes. You testified that Mr. Fullerton came and asked you to help him replace the battery. How long was it from the time he asked you to help him replace the battery until the time you witnessed him banging the battery on the plate?

ELLIS Certainly less than a minute.

HENDERSON Less than a minute?

ELLIS Uh-hmm.

HENDERSON And is it your job duty to help assist with --

ELLIS To assist 'em, right.

HENDERSON Okay. Would it be normal--would it be protocol for the claimant to try and change the battery by himself?

ELLIS It happens; yes, ma'am.

HENDERSON Okay. Did you see where the claimant was standing, the claimant being Mr. Fullerton, where he was standing at the time?

ELLIS He was standing on the rack.

HENDERSON Can you describe what the rack is?

UDGE Oh, okay. Be right back. (OFF RECORD)

We're back on record. No testimony was taken or given during the time that we were off record. I simply went and got Mr. Bradshaw. Would you agree, Mr. Spencer?

PENCER Yes.

UDGE Thank you. Would you agree, Ms. Henderson?

ENDERSON Yes.

UDGE Thank you. You've been called to testify, sir. Would you raise your right hand?

OATH ADMINISTERED. Mr. Bradshaw answered in the affirmative.

Thank you, sir. If you'd state your name and position?

BRADSHAW Scott Bradshaw, Perishable Superintendent of Albertsons.

JUDGE Okay; and as such, were the direct supervisor of Mr. Fullerton?

BRADSHAW Yes.

JUDGE And how long have you been his direct supervisor?

BRADSHAW A couple years, now.

JUDGE Okay. And did you interview him with respect to what occurred with the forklift?

BRADSHAW Yes.

JUDGE Okay. And tell me when the incident occurred and when you talked to him?

BRADSHAW The date, I don't have exactly. It's written on the letters.

JUDGE Okay.

BRADSHAW I called him in after LaVell James had approached me and told me what Earl had told him. And that's when I called Mr. Fullerton in, and we talked about it; and it started out where he denied anything, as far as involvement with the battery, or the lid, or whatever. And we proceeded to tell him about what was said, and what we've heard, and what Earl and LaVell had told me. Later he said it was an accident, and that it was--

had grease on it and it slipped out of his fingers. And that was, basically, I don't know (pause) —

JUDGE Okay. Anything else you said to him?

BRADSHAW No.

JUDGE Okay, thank you. Go ahead, Ms. Henderson?

HENDERSON You testified the conversation that you had, at any time did Mr. Fullerton make the excuse that he was standing on some rollers and had slipped?

BRADSHAW None.

HENDERSON Okay. And you said that at first he denied anything to do with the battery, is that all he said or can you expand on what he said?

BRADSHAW (Unintelligible), I don't; but he just acted like he didn't know nothing about it at first; and then as we got into talking and explaining that—that Earl seen him do this and LaVell told me this, and that's when he said it was an accident.

HENDERSON Okay. Now, did you make the decision to discharge the claimant?

BRADSHAW No.

HENDERSON Okay. And—and who was that decision made by, in part?

BRADSHAW Through Darrel, and I'm sure he had a conference with Boise.

HENDERSON Okay. No further questions.

JUDGE Thank you. Any questions you have, sir?

SPENCER Scott, during your interview with Mr. Fullerton, I guess during your investigative portion of this incident, did Gayle at any time state that the battery cover was already broken?

BRADSHAW (Pause) Uh, no.

SPENCER And you already testified that he said he—he didn't say anything about standing on the rollers and sliding, or slipping, or—or anything of that nature?

BRADSHAW No, nothing; no.

SPENCER That's all I have, Your Honor.

UDGE Okay. I assume that that has to do with the damaged forklift or reach truck, is that correct?

LAIMANT Yes.

UDGE All right. When--when did this occur; do you remember the date?

LAIMANT (No audible response)

UDGE Calendar help you at all?

LAIMANT (Long pause)

UDGE If you don't, that's okay. I just --

LAIMANT It's--it's the date that was stated on the report, I believe.

UDGE About April 2nd?

LAIMANT Yeah.

JUDGE Okay. What happened?

CLAIMANT I went in to get a battery change and it was, I believe, afternoon not morning. And I went in to ask Earl to come and help me. And I went out and I waited. It wasn't one minute; it was at least five (5) minutes. And I have a quota to keep; so I just took it upon myself to change the battery. I kicked the battery out. I--I switched batteries, and I pushed the fresh battery back in; and the batteries sit on rollers. And there's no way you can push 'em in without standing on those rollers. There's just no other way to do it. And usually you use the rollers as a brace to--to get enough force behind the battery, because they are so big and heavy, to push it in. And a lot of times, you know, you--you need help to do that. But I've had a lot of experience at it; so I got the battery back in and by this time Earl had come out. And, to me, he seemed like he was in a bad mood because I believe they had just got a butt chewing from--because they weren't keeping the machines in good operating order. 'Cause we were always having lifts break down and it was holding us up on our production. So he, to me, seemed to be in a bad way.

JUDGE What made you think that?

CLAIMANT Because he had an attitude of just, uh, short-tempered.

JUDGE Anything he did or said that made you think that?

CLAIMANT Uh, I can't remember exactly. Just I had that impression. That was the impression I had, but I don't exactly remember what was said.

JUDGE Thanks. Go ahead, sir.

KIDD No, I would not have—I would not have changed the decision that'd been made based on what (unintelligible).

JUDGE And why not?

KIDD I do not believe that Earl has any motivation to fabricate a story stating that Gayle was pounding, repeatedly, on the piece of equipment. He certainly has nothing to gain by that. And as you have heard, neither one of the employees has had any previous problems with each other. There's no personal vendetta, and certain cannot fathom anything to substantiate Earl fabricating such a story. He was there; he witnessed Gayle hitting the machine repeatedly and witnessed the damage, immediately following that. And had reported it, as he said, to his immediate supervisor as soon as he came in.

JUDGE Okay. Any other questions you have of him?

HENDERSON Yes. While the two warnings that happened sometime earlier did not play a crucial role in your decision, did you feel that—that the claimant had demonstrated this type of behavior in the past and that may have contributed to the decision?

KIDD Yes. Yes; indeed, it did.

HENDERSON Okay. The claimant testified that he had waited more than five (5) minutes, we have a few minutes time discrepancy, but that he was—he had a quota that he needed to meet. Does—does Mr. Fullerton have a quota?

KIDD The perishable day shift for our forklift operators do not have a quota. They are required to put away as much product as they possibly can throughout their shift. They are monitored by the supervision of their immediate foreman and supervisor, and we do not actually track pallets per hour or discipline them for, for example, not putting away enough product; and there has not been one incident in the past, to my knowledge, where an employee was reprimanded for taking too long to change a battery.

HENDERSON Okay. Mr. Bradshaw testified that in the meeting Mr. Fullerton did not provide the excuse that he had slipped on rollers; but had he provided that excuse, Mr. Ellis testified that he did not see Mr. Fullerton on the rollers. The claimant testified that he had to stand on the rollers, there was no way to change the battery without standing on the rollers. Do you have any knowledge on changing a battery? (Telephone ringing)

KIDD Yes, I'm familiar with the way the batteries are changed. Employees in the past have been instructed never to change the batteries by

themselves; we don't believe it's safe. And, personally, I cannot understand why a person having as much knowledge about changing these batteries as Gayle would, since he's been operating that type of equipment for approximately eight (8) years, why he would even stand on the roller to begin with. Of course, I didn't witness the incident. I can't say that he was not standing on the roller. Had that been the cause of him slipping and falling, I--I also can't imagine why he would not bring that up at the time he was being terminated.

HENDERSON But if--in response to his claim that there's no other way to pushing a battery without standing on the rollers, you would have to rebut that, according to what you've just said?

KIDD That is--Absolutely.

JUDGE Let's not put words in his mouth, okay.

HENDERSON Would you have to say that that's not accurate?

KIDD That's--that is not accurate. It's--it is not necessary to stand on the rollers to change the battery, to take it in--to put it in or take it out.

HENDERSON Okay. No further questions.

JUDGE Thank you. Any questions you have?

SPENCER While it's not necessary to stand on the rollers to change the battery, would it be more convenient, would it be conducive for an employee to do so even though that it might be against the rules?

KIDD I can't understand why. Pushing a 1500-pound battery, I cannot imagine why anyone would want to stand on rollers that were designed to move a 1500-pound weight freely.

SPENCER And you stated that there--there was not a quota for--for the pallet track (?) operators as to how many pallets a day that they put away. Isn't it Albertsons' policy to extract or get the production of their employees at a high level and by doing so, that they, while maybe not setting a quota, they do have a standard or a expected goal?

KIDD The amount of product that a forklift operator puts away is not individually tracked. Scott Bradshaw does monitor the total amount of pallets put away by all the forklift operators in one shift; and that is for his--used by him as a tool to know how productive the shift is, as a whole, in putting product away. Of course, that verifies for--for many--for various reasons. Some equipment may break down, people may not be there, they may be extremely busy and congested. The--I simply was trying to make a point that as far as a quota, or a minimum

ELLIS Right, when I offered to hold it in after he'd been striking it. He didn't put the plate in, continued to beat on it. I walked to the back of it 'cause I didn't want to get hit in the face with anything.

JUDGE Okay. So in the beginning, then, you were at the opposite side of the forklift.

ELLIS As I was walking out, like I stated, he was hitting it.

JUDGE Okay. Yeah, what--Okay, when you first came in, then you came in, probably, where your finger is, we'll put that north.

ELLIS Right.

JUDGE Okay. So you were at the north there, and then he was at the west.

ELLIS Uh-hmm.

JUDGE Then you moved from the north, then, over to the east; and between you, then, was the forklift, is that correct?

ELLIS Right; uh-hmm.

JUDGE Okay. When you got over here, what was occurring?

ELLIS He was--wouldn't put the plate in. Was hitting it again.

JUDGE Okay. And how could you see him?

ELLIS I couldn't see his feet at that particular minute.

JUDGE Okay.

ELLIS But, like I said, in walking from the backside to the--from the north side to the east side, --

JUDGE North to east, okay.

ELLIS I'd seen him striking it, standing on the rail, already, from the north side. And then when he wouldn't put the plate in, I walked back to the north side so that I wouldn't get hit with anything.

JUDGE Okay. Then anything else you have of him, sir?

SPENCER No.

JUDGE Okay. You, Ms. Henderson?

FINDINGS OF FACT:

Prior to filing for unemployment benefits effective April 5, 1992, the claimant earned $11.10 per hour working full-time as a forklift operator for Albertsons where he was employed from April 5, 1981 to April 3, 1992. The claimant was discharged from this employer for the reasons set forth as follows.

The company policy allows for the immediate dismissal of an employee who willfully damages company property. The claimant was aware of the policy.

The union contract Albertsons has with Teamsters Local #222 provides that warning notices an employee may receive will not remain in effect for more than one year.

The claimant received two warning notices. One was in April 1989 for operating equipment in an unsafe manner. The second was in January 1990 for willful destruction of company property. Prior to April 1989, the claimant had received no prior reprimands. On approximately April 19, 1989, the claimant had just finished putting a pallet on a crown when another driver drove up beside him and put a pallet beside his. This driver asked the claimant about a business matter. In the course of the conversation, the claimant forgot he had not lowered the forks. When he drove away and turned the corner, the forks caught on an object which resulted in the forklift tipping over. The claimant was placed on suspension without pay from April 20, 1989 to April 25, 1989. On January 31, 1990, the crew was leaving early. It was Superbowl Sunday. The door to the time clock was locked. The claimant and two others began "goofing around" by banging on the door. The claimant kicked the door. He hit it harder than he expected. A board by the doorknob cracked. The claimant estimated the cost of repair to be $5.00. The door did not open. The claimant received two weeks suspension without pay for the infraction.

On April 2, 1992, the claimant needed to change his lift trucks battery. The claimant was a long term employee and had experience performing this task. The batteries weighed fifteen hundred to eighteen hundred pounds. The batteries are on rollers so they can be pushed out of the truck onto a truck like rack system with rollers. In turn, the new battery moves off onto the truck on rollers. A heavy metal plate holds the battery in place. The process takes two people.

The claimant drove his reach truck along side of the battery rack. He asked the maintenance person for a battery change. While he was waiting for the maintenance man, he removed the old battery. He had pushed the new battery into the truck but was having difficulty securing it with the metal plate. The maintenance man was on the opposite side of the truck. In this position, the maintenance man could not see the claimant's feet. The claimant slipped. When he tried to regain his balance, the metal plate he had in his hand hit the lift and chipped it. The maintenance man believed the claimant purposefully broke the battery cover. The maintenance man told the claimant if he did that again he would turn him in. The claimant responded to go ahead and turn him in and that it would be the last thing he did. The claimant thought the maintenance man was joking. Both perceived the other to be in a bad mood that day.

The maintenance man did report the claimant to his supervisor. In addition, he wrote:

> On april 2, 1992 at the approximate time of 5:30 a.m. Gail (sic) Fullerton asked for a battery. When I got out there he had pushed his old battery out and his new one in and had difficulty putting in the retaining plate for the battery and started hitting the top plastic cover repeatedly, when I told him to stop or I would turn him in he hit it one more time and told me to go ahead he didn't give a shit. Then he told me if I did I'd regret it.
>
> Earl L. Ellis
> 4-2-92

Based on the maintenance persons account of what occurred, coupled with the past reprimands, the company decided the claimant willfully broke the plastic battery cover and discharged him. The claimant did tell the company the damage was not intentionally.

REASONING AND CONCLUSION OF LAW:

The company did consider the past reprimands when deciding to discharge the claimant. The 1989 and 1990 incidents were given no weight with respect to this decision. The company violated its union agreement by adding these reprimands to their decision to dismiss the claimant. Both incidents occurred over two years ago, well outside the time limitation, as per the union contract, for consideration. Moreover, the 1989 occurrence was a one time isolated instance due to inadvertence when the claimant became distracted. The 1990 mishap was the result of horseplay. While the kicking of the door is not condoned, it was not meant to be destructive.

The claimant and the maintenance man have some crucial differences in their testimony with respect to the April 2, 1992 battery change. The maintenance man testified the claimant beat the plastic battery cover repeatedly. He did not say the claimant broke it, however. The claimant stated he did not break this cover nor did he hit it. He contends it was broken before he went to the battery area. The claimant asserts he lost his balance while changing the battery and, in this process, the metal plate he was holding in his hand inadvertently hit the fork lift. Importantly, the maintenance man could not view the claimant's feet during the entire process. While their testimony is different, the claimant seems more credible to the Administrative Law Judge. Even if the credibility issue is not considered, the weight of the evidence in a discharge case rests with the employer. If the weight is equal, the scales tip to the claimant in a discharge case.

Section 35-4-5(b)(1) of the Utah Employment Security Act provides that a claimant for unemployment insurance benefits is not eligible if he or she was discharged from employment for just cause or an act or omission in connection with the employment which was deliberate, willful or wanton and adverse to the employer's rightful interests. In order to support a denial of unemployment insurance benefits, an employer must establish by a preponderance of the evidence the claimant was at fault in causing his or her own unemployment. That is, the claimant must be shown to have had a substantial degree of control, knowledge and culpability in the conduct resulting in discharge. Thus, a claimant will not generally be denied unemployment benefits where discharged for mere inability, inefficiency, inadvertence or isolated incidents of good faith error in judgment or ordinary negligence.

The employer did not establish by the preponderance of the evidence that the claimant's actions rose to the level of culpability, knowledge and control to impose a disqualification. The claimant's testimony is accepted that the damage done on April 2, 1992 was accidental. It is held he was discharged at the convenience of the employer but not for disqualifying just cause. Benefits are awarded.

A contributing employer may be relieved of charges if an individual is separate for reasons which are disqualifying. Since the claimant was separated for reasons which are not disqualifying, the employer is not relieved of charges. for the claim.

DECISION:

The decision of the adjudicator denying benefits pursuant to Section 35-4-5(b)(1) of the Utah Employment Security Act is reversed. Benefits are allowed effective April 5, 1992 and continuing provided the claimant is otherwise eligible.

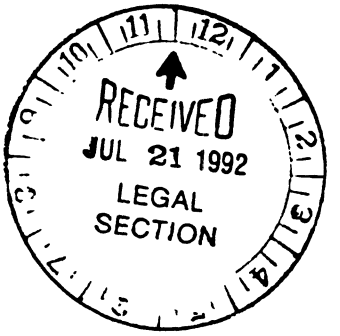
Albertsons is not relieved of charges for Gayle M. Fullerton pursuant to Section 35-4-7(c)3(C) of the Act.

L. Liddle-Gamonal

La Vone Liddle-Gamonal
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

GIBBENS COMPANY
P.O. Box 57832
Salt Lake City, Utah 84157
Telephone (801) 261-0071
Fax (801) 261-0110

July 20, 1992



Board of Review
Industrial Commission of Utah
Department of Employment Security
P. O. Box 11600
Salt Lake City, Utah 84147

Re: Gayle M. Fullerton
SS# 528-11-6899
Case No. 92-BR-241

Dear Board Members:

The Gibbens Company, on behalf of the employer, Albertson's Inc., requests a thorough review of the decision of the Administrative Law Judge, dated June 3, 1992, that reversed a previous decision of the adjudicator dated April 5, 1992.

In the hearing, Mr. Earl Layne Ellis, maintenance for Albertson's, testified that the claimant struck company property several times in order to attempt to replace a retaining plate for a replaced battery (Trans. pg. 10, para. 1). In the process of beating on this equipment, damage occurred in the amount of $169.48 (employer's exhibit #7). When the claimant was told to stop beating on the equipment by Mr. Ellis, the claimant struck the equipment again.

The employer has a policy that establishes willful damage to company property is grounds for immediate termination. The claimant was aware of this policy and had signed this document (employer exhibit #4). The claimant has had a history of behavior regarding damage to company propert (ALJ decision pg. 3) (Trans. pg. 6).

The claimant testified he damaged the company's property by accident (Trans. pg. 30). Mr. Ellis testified that not only had the claimant struck the equipment several times after Mr. Ellis threatened to report the claimant if he didn't stop beating on the equipment, the claimant also threatened Mr. Ellis if he did turn him in, and proceeded to strike the equipment again (Trans. pg. 10).

If the claimant had slipped and struck the equipment by accident, as he claims, there would be no reason to strike the equipment again unless it was intentional. At no time did the claimant provide the excuse that hitting the equipment was an accident (Trans. pg. 1).

Mr. Darrell Kidd, Warehouse Operations Manager, testified to the character and voracity of Mr. Ellis (Trans. pg. 23). The claimant's voracity has been in question since the final incident occurred. When questioned by Mr. Scott Bradshaw, Perishable Superintendent, the claimant denied his involvement in this incident until pressed with information that had been provided from Mr. Ellis and Mr. LaVell James (Trans. pg. 15).

In conclusion, previous warnings are not required in order to discharge an employee who willfully damages company property. The claimant has had a history of suspensions for such conduct during the past few years. The claimant knew his job would be in jeopardy for committing such actions by virtue of previous suspensions and a signed document.

The claimant was asked by maintenance personnel to stop striking company equipment. The claimant threatened the maintenance personnel and proceeded to strike the equipment again. When questioned by management about the incident, he first denied that the incident had occurred. When faced with the vane of his accusers, the claimant changed his story and stated that it was an accident. At the hearing the claimant further changed his story and stated that he had slipped, a detail previously not mentioned. Mr. Ellis's story has remained the same throughout this entire process.

As such, it is the employer's position that a reasonable review of the facts should prevail to establish that the claimant committed an act of wanton, willful disregard to the employer's rightful interest, and that the claimant had, or should have known that his actions would or could result in his termination.

Further, it certainly was within the claimant's control to stop striking the company's equipment after being told by maintenance personnel to do so.

And finally, the employer has suffered a substantial loss due to the damage caused by the claimant's lack of patience or concern.

The employer respectfully requests that the initial decision to not allow benefits, be reinstated, and that the employer's benefits ratio account be relieved of all charges in this matter.

Sincerely,

Robert F. Watson

Robert F. Watson
Sr. Account Executive

RFW:dd

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

SMH/LL/ERT/cd

GAYLE M. FULLERTON
S.S.A. No. 528-11-6899 :

: Case No. 92-A-3239

: DECISION

: Case No. 92-BR-241

DEPARTMENT OF EMPLOYMENT SECURITY :

The employer, Albertsons, Inc., appeals the decision of the Administrative Law Judge in the above-entitled matter which held that the claimant, Gayle M. Fullerton, had been discharged from his employment with the employer for reasons that are not disqualifying under Section 35-4-5(b)(1) of the Utah Employment Security Act. The ALJ's decision, therefore, allowed payment of unemployment benefits to the claimant effective April 5, 1992, and continuing, provided he is otherwise eligible. The ALJ's decision also held the employer liable for benefit charges pursuant to Section 35-4-7(c) of the Act.

After careful consideration of the record in this matter, the Board of Review finds the decision of the Administrative Law Judge to be a correct application of the provisions of the Utah Employment Security Act, supported by competent evidence and, therefore, affirms the decision. In so holding, the Board of Review adopts the findings of fact and conclusions of law of the Administrative Law Judge.

The employer argues on appeal that the ALJ erred in finding the claimant slipped and broke the battery plate accidentally. The employer further argues that a thorough review of the record reveals that the employer's witness, Mr. Ellis, was more credible than the claimant.

In affirming the decision of the Administrative Law Judge, the Board of Review notes that the employer is correct in its argument that this case hinges on balancing the respective credibility of Mr. Ellis and the claimant. The ALJ, who had the opportunity to observe the demeanor of both witnesses, made a specific finding that the claimant "seems more credible to the Administrative Law Judge." The Board of Review only reviews written transcripts and documents associated with the Administrative Law Judge hearing and does not have the opportunity to observe witnesses. The Board must, therefore, rely on the impressions of the ALJ on matters of credibility derived from observing the demeanor of the witnesses. Since the

Administrative Law Judge found the claimant to be more believable than the employer witness and since the ALJ's finding of fact that the claimant accidentally slipped and inadvertently broke the battery plate is supported by substantial competent evidence in the record, the Board affirms that finding and affirms the Administrative Law Judge's decision that the employer did not have just cause within the meaning of the Utah Employment Security Act for discharging the claimant.

This decision becomes final on the date it is mailed, and any further appeal must be made within 30 days from the date of mailing. Your appeal must be submitted in writing to the Utah Court of Appeals, Midtown Plaza, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to Section 63-46b-16 of the Utah Administrative Procedures Act and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

/s/ Stephen M. Hadley
/s/ Thomas L. Lewis

Although the Administrative Law Judge made a specific finding regarding the respective credibility of the claimant and Mr. Ellis, my reading of the record persuades me that Mr. Ellis' version of the incident leading to the claimant's discharge is more trustworthy than the claimant's and I would overrule the ALJ's finding that the claimant was more credible than Mr. Ellis.

Mr. Ellis had no apparent advantage to be gained by saying the claimant repeatedly and willfully beat on the battery plate. The claimant in fact testified that he and Mr. Ellis got along well and no motive is suggested in the record why Mr. Ellis would lie. When asked if he could have been mistaken about what he saw, Mr. Ellis was steadfast in repeating that the claimant was beating on the plate in frustration, not just trying to regain his balance after a fall. The claimant on the other hand, when accused of beating on the employer's property, had everything to gain by claiming he slipped and accidentally damaged the battery plate. The claimant's account is further thrown into question because of his claim two years earlier that he accidentally slipped and broke a door jam when he was kicking at a door while horsing around. I find the claimant's repeated excuse of "slipping" when others reported more willful behavior to be suspicious.

Mr. Ellis' version of the event leading to the claimant's discharge has not varied from the time he first reported it. He has asserted from the beginning that he saw the claimant beat numerous times in frustration on the battery plate. The ALJ minimized Mr. Ellis' observation by making a finding that Mr. Ellis was unable to see the claimant's feet and so could not see if the claimant was falling. Mr. Ellis' testimony, however, was that though he momentarily could not see the claimant's feet, the claimant was not falling, but was clearly beating on the battery plate in anger evidenced by the fact that the claimant struck the battery plate again and threatened Mr. Ellis after he told him to stop.

The claimant admitted he hit the battery plate at least twice. This version seems inherently inconsistent to me as to hit the plate twice would have meant he slipped and fell twice upon the battery plate. This is not the claimant's testimony. He testified rather that he slipped once, then stood up, and hit the plate with his hand. This story does not ring true to me and is not at all consistent with the observations of Mr. Ellis. For these reasons, I would overrule the Administrative Law Judge's finding of fact that the employer's property was damaged accidentally by the claimant.

Furthermore, I disagree with the Administrative Law Judge's conclusions about the inappropriateness of the employer referencing past infractions of the claimant in arriving at its conclusion to discharge the claimant. The union contract provided that employee warning notices will not remain in effect for more than one year. The infraction for which the claimant was discharged, willful destruction of company property, was grounds for immediate dismissal under the employer's rules. There was no need on the part of the employer to go through any step-by-step disciplinary procedure in the face of the claimant's actions and they did not do so. Referencing his past behavior of kicking in a door was not necessary to sustain a discharge but only adds strength to the employer's argument that this was an employee who exercised marginal control over his temper and who the employer might reasonably expect to see repeat destructive behavior. By referencing the claimant's past behavior the employer established both the elements of knowledge and harm as required to make a finding of just cause under the Utah Employment Security Act. For these reasons, I dissent from the majority opinion and would reverse the decision of the Administrative Law Judge that the claimant was not discharged for just cause and that the employer is chargeable for benefits paid in connection with this claim.

/s/ Lawrence Disera

BOARD OF REVIEW

Dated this 27th day of July, 1992.

Date Mailed: July 30, 1992.

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The stautes and rules which are determinative in this matter are set forth verbatim in Appendix A, and include the following:

Utah Code Annotated (1953, as amended) Sections 35-4-5(b)(1), 63-46b-16 and 78-2a-3(2)(a).

Utah Administrative Code (1992) R562-5b-102 and R562-5b-108.4.

Utah Rules of Appellate Procedure Rule 14.

35-4-5 Ineligibility for Benefits.

An individual is ineligible for benefits or for purposes of establishing a waiting period:

Quit.

(a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount. A claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The commission shall, in cooperation with the employer, consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

Quit to Accompany Spouse.

Notwithstanding any other provision of this section, a claimant who has left work voluntarily to accompany, follow or join his or her spouse to or in a new locality does so without good cause for purposes of this subsection.

Discharge for Just Cause.

(b) (1) For the week in which the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

Discharge for Dishonesty.

(b) (2) For the week in which he was discharged for dishonesty constituting a crime or any felony or class A misdemeanor in connection with his work as shown by the facts, together with his admission, or as shown by his conviction in a court of competent jurisdiction of that crime and for the 51 next following weeks and for each week thereafter until the claimant has performed services in bona fide covered employment and

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

Function of district court.

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

History: C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers; and

(e) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1992

78-2-3. Repealed. 1988

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to the practice of law. 1988

78-2-5. Repealed. 1988

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court. 1988

78-2-7. Repealed. 1988

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state. 1988

78-2-8 to 78-2-14. Repealed. 1984, 1988

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1. Creation — Seal.
78-2a-2. Number of judges — Terms — Functions — Filing fees.
78-2a-3. Court of Appeals jurisdiction.
78-2a-4. Review of actions by Supreme Court.
78-2a-5. Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal. 1988

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation $1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary.

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1992

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

CHAPTER 3

DISTRICT COURTS

Section

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78-3-3. Term of judges — Vacancy.
78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when court does not exist.
78-3-5. Repealed.
78-3-6. Terms — Minimum of once quarterly.
78-3-7 to 78-3-11. Repealed.
78-3-11.5. State District Court Administrative System.
78-3-12. Repealed.
78-3-12.5. Costs of system.
78-3-13. Repealed.
78-3-13.4. Counties joining court system — Procedure — Facilities — Salaries.
78-3-13.5, 78-3-14. Repealed.
78-3-14.5. Allocation of district court fees and fines.
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78-3-1 to 78-3-2. Repealed. 1971, 1981, 1988

78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. 1988

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when court does not exist.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) Under the general supervision of the presiding officer of the Judicial Council and subject to policies established by the Judicial Council, cases filed in the district court, which are also within the concurrent jurisdiction of the circuit court, may be transferred to the circuit court by the presiding judge of the district court in multiple judge districts or the district court judge in single judge districts. The transfer of these cases may be made upon the court's own motion or upon the motion of either party for adjudication. When an order is made transferring a case, the court shall transmit the pleadings and papers to the circuit court to which the case is transferred. The circuit court has the same jurisdiction as if the case had been originally commenced in the circuit court and any

same sex. For sexual harassment to be discriminatory, the following three elements must be shown to exist:

(1) Unwanted conduct or communication of a sexual nature which adversely affects a person's employment relationship or working environment, if:

(a) submission to the conduct is either an explicit or implicit term or condition of employment, or

(b) submission to or rejection of the conduct is used as a basis for an employment decision affecting the person, or

(c) the conduct has a purpose or effect of substantially interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment,

(2) Unsolicited, deliberately sexual statements, gestures or physical contacts which are objectionable to the recipient,

(3) Undermines the integrity of the workplace, destroys morale and offends legal and social standards of acceptable behavior.

b. Inappropriate behavior which has sexual connotation but does not meet the test of sexual discrimination is insufficient to establish good cause for leaving work.

11. Discrimination

It is also a violation of Federal law to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee because of the individual's race, color, religion, sex or national origin.

R562-5a-8. Effective Date of Disqualification.

1. The disqualification under this section technically begins with the week the claimant voluntarily quit the job. However, to avoid the confusion which arises when a disqualification is made for a period of time prior to the filing of a claim, the claimant will be notified that benefits are denied beginning with the effective date of a new or reopened claim. The disqualification continues until the claimant returns to work in a bona fide covered employment and earns six times his weekly benefit amount after the week in which the claimant left work. A disqualification which begins in one benefit year will continue into a new benefit year unless purged by subsequent earnings.

2. If an individual is receiving remuneration which is attributed to a period of time following the last day of work, such as severance or vacation pay, the "week in which the claimant left work" is considered to be the last week for which such remuneration was attributable as an individual is not "unemployed" while receiving remuneration from an employer, and such severance or vacation pay cannot be used to purge a disqualification.

KEY: unemployment compensation, employment, employee's rights, employee terminations*

1989 35-4-5(a)

R562-5b. Discharge and Discharge for Crime.

R562-5b-101. Discharge General Definition.

Ordinarily accepted concepts of justice are used in determining if a discharge is disqualifying under the "just cause" provisions of the Act. Just cause is defined as a job separation that is necessary due to the seriousness of actual or potential harm to the employer provided the claimant had knowledge of the employer's expectations and had control over the circumstances which led to the discharge. Just cause is not established if the reason for the discharge is baseless, arbitrary or capricious or the employer has failed to uniformly apply reasonable standards to all employees when instituting disciplinary action. The purpose of this section is to deny benefits to individuals who bring about their own unemployment by conducting themselves, with respect to their employment with callousness, misbehavior, or lack of consideration to such a degree that the employer was justified in discharging the employee. However, when an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are beyond the claimant's control. The question which must be established by the evidence is whether the claimant is at fault in his resulting unemployment. Unemployment insurance benefits will be denied if the employer had just cause for discharging the employee. However, not every cause for discharge provides a basis to deny benefits. In order to have just cause for discharge pursuant to Section 35-4- 5(b)(1) there must be some fault on the part of the employee involved.

R562-5b-102. Just Cause.

1. The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct

will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

(1) Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgment An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer. For example: A long term employee who does not have a history of tardiness or absenteeism is absent without leave for a number of days due to a death in his immediate family Although this is a violation of the employer's rules and may establish just cause for discharging a new employee, the fact that the employee has established over a long period of time that he complies with attendance rules shows that the circumstance is more of an isolated incident rather than a violation of the rules that is or could be expected to be habitual. In this case because the potential for harm to the employer is not shown, it is not necessary for the employer to discharge the employee, and therefore just cause is not established

b Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown A specific warning is one way of showing that the employee had knowledge of the expected conduct After the employee is given a warning he should be given an opportunity to correct objectionable conduct Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

(1) For Example When the employer has an established procedure of progressive discipline, such procedures generally must have been followed in order to establish that the employee had knowledge of the expected behavior or the seriousness of the act The exception is that very severe conduct, such as criminal actions, may justify immediate discharge without following a progressive disciplinary program

c. Control

The conduct must have been within the power and capacity of the claimant to control or prevent.

2 Just cause may not be established when the reason for discharge is based on such things as mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, etc. These examples of conduct are not disqualifying because of the lack of knowledge or control. However, continued inefficiency, repeated carelessness, or lack of care exercised by ordinary, reasonable workers in similar circumstances, may be disqualifying depending on the reason and degree of the carelessness, the knowledge and control of the employee.

3. The term "just cause" as used in Section 5(b)(1) does not lessen the requirement that there be some fault on the part of the employee involved. Prior to the 1983 addition of the term "just cause" the Commission interpreted Section 5(b)(1) to require an intentional infliction of harm or intentional disregard of the employer's interests. The intent of the Legislature in adding the words "just cause" to Section 5(b)(1) was apparently to correct this restrictive interpretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that such acts have serious effect on the employee's job or the employer's interests.

R562-5b-103. Burden of Proof.

1. In a discharge, the employer initiates the separation and, as such, is the primary source of information with regard to the reasons for the dismissal. The employer has the burden of proof which is the responsibility to establish the facts resulting in the discharge. The employer is required by the Statute in Section 35-4-11(g) to keep accurate records and to provide correct information to the Department for proper administration of the Act. Although the employer has the burden to establish just cause for the discharge, if sufficient facts are obtained from the claimant, a decision will be made based on the information available. The failure of one party to provide information does not necessarily result in a ruling favorable to the other party.

2 All interested parties have the right to give rebuttal to information contrary to the interests of that party.

R562-5b-104. Quit or Discharge.

The determination of whether a separation is a quit or a discharge is made by the Department based on the circumstances which resulted in the separation. The conclusions on the employer's records, the separation notice or the claimant's report are not controlling on the Department.

1 Discharge Before Effective Date of Resignation

a Discharge

When an individual notifies an employer that he intends to leave as of a definite date in the future and is discharged prior to that date, the cause for the separation on the day the separation takes place is the controlling factor in determining whether it was a quit or discharge Although the separation might have been motivated by the claimant's announced resignation, the employer was the moving party in ending the employment prior to the resignation date. Therefore, the immediate reason was more closely related to the employer's action than to the claimant's announced intention to quit. Unless disqualifying conduct is involved, the separation is considered to be for the convenience of the employer. If the employer does not pay regular wages through the period of the notice but merely pays vacation pay which was not previously assigned to the period of the notice, the separation is still the result of a discharge which occurs prior to the date the worker planned to quit. The assignment of vacation pay to the period of time between the notice of intended resignation and the last date the employee planned work does not change the character of the sep-

aration.

b Quit

If an employee announces a future date of resignation and is relieved of work responsibilities but is paid regular wages through the date of his announced resignation, it is not a discharge, but a quit.

2 Leaving in Anticipation of Discharge

When an employee leaves work in anticipation of a possible discharge or layoff, and if the reason for the discharge would not be disqualifying, the separation is generally considered to be a voluntary quit. However, an individual who leaves work to avoid virtually certain discharge for disqualifying conduct cannot thereby avoid the disqualifying provisions of Section 35-4-5(b), and the separation is considered a discharge rather than voluntary leaving.

3. Employee Knows His Action will Result in Discharge

Absence taken without permission, or other actions contrary to specific reasonable instructions from the employer, are generally considered a voluntary separation rather than discharge, if the worker was given a choice of complying or being separated.

R562-5b-105. Disciplinary Suspension or Involuntary Furlough.

When an employee is put on a disciplinary suspension or involuntary furlough, he may meet the definition of "unemployed." If the claimant files during the suspension or furlough, the reason for the suspension or furlough must be adjudicated as a discharge, even though the claimant is still attached to the employer and expects to return to work. A suspension which was reasonable and necessary to prevent potential harm to the employer or to maintain necessary discipline would generally result in a disqualification under this section provided the elements of control and knowledge are present. Failure to return to work at the end of the definite period of suspension or furlough would be considered a voluntary quit and eligibility would then be determined consistent with Section 35-4-5(a), if the claimant had not been previously denied.

R562-5b-106. Proximal Cause -- Relation of Offenses to Discharge.

1. The cause for discharge is that conduct which motivates the employer to make the decision to terminate the employee's services. If the decision has truly been made, it is generally demonstrated by way of notice to the employee or the initiation of a personnel action. Although the employer may learn of other offenses following the making of the decision to terminate, the reason for the discharge is limited to that conduct of which the employer was aware prior to making the decision. However, if the employer discharges a person because of some preliminary evidence of certain conduct, but does not obtain all of the proof of the conduct until after the separation notice is given, it could still be concluded that the discharge was caused by that conduct which the employer was investigating. Eligibility for benefits will then be determined by considering the extent of culpability, knowledge and control.

2. When the discharge does not occur immediately after the employer becomes aware of an offense, a presumption arises that there were other reasons for the discharge. This relationship between the offense and the discharge must be established both as to cause and time. The presumption that the conduct was not the cause of the discharge may be overcome by a showing that the delay was due to such things as investigation, arbitration, or hearings conducted with regard to the employee's conduct. When a grievance or arbitration is pending with respect to the discharge, the Department's decision will be based on the information available to the Department. The Department's decision is not binding on the grievance resolution process or an arbitrator and the decision of the arbitrator is not binding On the Department. When an employer is faced with the necessity of a reduction in his workforce but uses an employee's prior conduct as the criteria for determining who will be laid off, the lack of work is the primary motivation or cause of the discharge, not the conduct.

R562-5b-107. In Connection with Employment.

Disqualifying conduct is not limited to offenses which take place on the employer's premises or during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer. All employers, both public and private have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name or the institution. Legitimate interests of employers include, but are not limited to: goodwill of customers, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

R562-5b-108. Examples of Reasons for Discharge.

In all the following examples, the basic elements of just cause must be considered in determining eligibility for benefits. The following examples do not include all reasons for discharge.

1. Violation of Company Rules

If an employee violates reasonable rules of the employer and the three elements of culpability, knowledge and control are established, benefits must be denied.

a. The reasonableness of the employer's rules will depend on the necessity for such a rule as it affects the employer's interests. Rules which are contrary to general public policy or which infringe upon the recognized rights and privileges of individuals may not be reasonable. An employer must have broader prerogatives in regulating conduct when employees are on the job than when they are not. An employer must be able to make rules for employee on-the-job conduct that reasonably further the legitimate business interests of the employer. An employer is not required to impose only minimum standards, but there may be some justifiable cause for violations of rules that are unreasonable or unduly harsh, rigorous or exacting. When rules are changed, adequate notice and reasonable opportunity to comply must be afforded. If the employee believes a rule is unreasonable, he has the responsibility to discuss his concerns with the employer and give the employer an opportunity to take corrective action.

b. Discharges may be regulated by an employment contract or collective bargaining agreement. Just cause

for the discharge is not established if the employee's conduct was consistent with his rights under such contract or the discharge was contrary to the provisions of such contract.

c. Habitual offenses may not be disqualifying conduct if it is found that the act was condoned by the employer or was so prevalent as to be customary. However, when the worker is given notice that the conduct will no longer be tolerated, further violations could result in a denial of benefits.

d. Culpability may be established even if the result of the violation of the rule does not in and of itself cause harm to the employer, but the resultant lack of compliance with rules diminishes the employer's ability to have order and control. Culpability is established if termination of the employee was required to maintain necessary discipline in the company.

e. Knowledge of the employer's standards of behavior is usually provided in the form of verbal instructions, written rules and/or warnings. However, the warning is not always necessary for a disqualification to apply in cases of violations of a serious nature of universal standards of conduct of which the claimant should have been aware without being warned.

2. Attendance Violations

a. It is the duty of the worker to be punctual and remain at work within the reasonable requirements of the employer. Discharge for unjustified absence or tardiness is considered disqualifying if the worker knows that he is violating attendance rules. Such violations are generally a serious matter of concern to employers as attendance standards are necessary to maintain order, control, and productivity. Discharge for an attendance violation beyond the control of the worker is not disqualifying unless the worker reasonably could have given notice or obtained permission consistent with the employer's rules.

b. In cases of termination for violations of attendance standards, the employee's recent history of attendance shall be considered to determine if the violation is an isolated incident, or demonstrates a pattern of unjustified absences within the control of the employee. Flagrant misuse of attendance privileges may result in a denial of benefits even if the last incident was beyond the employee's control.

3. Falsification of Work Record

a. The duty of honesty is inherent in any employee/employer relationship. A statement made in an application for a job may be considered as connected with the work, even though it is made before the work begins. An individual begins his obligations as an employee when he makes an application for work. One of those obligations is to give the employer truthful answers to all material questions. Any falsification of information which may operate to expose the employer to possible loss, litigation, or damage would be considered material and therefore may establish culpability. If the claimant made a false statement while applying for work in order to be hired, benefits may be denied even if the claimant would have otherwise remained unemployed and eligible for the receipt of unemployment benefits depending upon the degree of knowledge, culpability and control.

4. Insubordination

Authority is required in the work place to maintain order and efficiency. An employer has the right to expect that lines of authority will be maintained; that reasonable orders, given in a civil manner, will be obeyed; that supervisors will be respected and that their authority will not be undermined. In determining when insubordination (resistance to authority) becomes disqualifying conduct, the fact that there was a disregard of the employer's interests is the major importance. Mere protests or dissatisfaction without an overt act is not in disregard of the employer's interests. However, provocative remarks to a superior or vulgar or profane language in response to a civil request may be insubordination if it is conducive to disruption of routine, negation of authority and impairment of efficiency. Mere incompatibility or emphatic insistence or discussion by an employee who was acting in good faith is not disqualifying conduct.

5. Loss of License

When an employee loses a license which he knows is required for the performance of the job, and the individual had control over the circumstances which resulted in the loss of the license, such conduct is disqualifying. For example, if the claimant worked as a driver, and lost his license because of a conviction for driving under the influence (DUI), culpability is established if he fails to obtain a permit to drive at work or the conviction would expose the employer to additional liabilities. The employer cannot authorize an employee to drive in violation of the law. Also, additional insurance costs or other liabilities are a legitimate concern of the employer. Knowledge is established because it is a matter of common knowledge in the State of Utah that driving under the influence of alcohol is a violation of the law and is punishable by loss of the individual's driving privileges. Judicial notice can be taken of this fact because a question relative to this matter is on every driver's license test. He had control in that he made a conscious decision to risk loss of the license when he failed to make arrangements for transportation prior to becoming under the influence of intoxicants.

R562-5b-109. Effective Date of Disqualification.

The Act provides that any disqualification under this section will include "the week in which the claimant was discharged . . ." However, to avoid confusion, the denial of benefits will begin with the Sunday of the week for which claimant has filed for benefits.

R562-5b-201. Discharge for Crime--General Definition.

1. A crime is a punishable act in violation of law; an offense against the State or the United States. "Crime" and "Misdemeanor" are synonymous terms; though in common usage crime is used to denote offenses of a more serious nature. However, for example: an insignificant, although illegal act, or the taking or destruction of something which is of little or no value, or believed to have been abandoned may not be sufficient to establish that a crime was committed as defined for the application of this section of the Act, even if the claimant was found guilty of a violation of the law.

2. The duties of honesty and responsible behavior are implied in any employment relationship. A worker is obligated to deal with his employer responsibly in truthfulness and good faith. The penalties imposed by this Section (a 52 week disqualification and subsequent

TITLE III.

REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, COMMISSIONS, AND COMMITTEES.

Rule 14. Review of administrative orders: how obtained; intervention.

(a) **Petition for review of order; joint petition.** When judicial review by the Supreme Court or the Court of Appeals is provided by statute of an order or decision of an administrative agency, board, commission, committee, or officer (hereinafter the term "agency" shall include agency, board, commission, committee, or officer), a petition for review shall be filed with the clerk of the appellate court within the time prescribed by statute, or if there is no time prescribed, then within 30 days after the date of the written decision or order. The term "petition for review" includes a petition to enjoin, set aside, suspend, modify, or otherwise review a notice of appeal or a writ of certiorari. The petition shall specify the parties seeking review and shall designate the respondent(s) and the order or decision, or part thereof, to be reviewed. In each case, the agency shall be named respondent. The State of Utah shall be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) **Statutory and docketing fees.** At the time of filing any petition for review, the party obtaining the review shall pay to the clerk of the appellate court such filing fees as are established by law, and also the fee for docketing the appeal. The clerk shall not accept a petition for review unless the filing and docketing fees are paid.

(c) **Service of petition.** A copy of the petition for review shall be served by the petitioner on the named respondent(s), upon all other parties to the proceeding before the agency, and upon the Attorney General of Utah, if the state is a party, in the manner prescribed by Rule 3(e). The petitioner, at the time of filing the petition for review, shall also file with the clerk of the appellate court a certificate reflecting service upon all parties to the agency proceeding who have been served.

(d) **Intervention.** Any person who seeks to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and upon all parties who participated before the agency, and file with the clerk of the appellate court a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 40 days of the date on which the petition for review is filed.

MAILING CERTIFICATE

I hereby certify that, on the 5th day of February, 1993, I caused to be mailed, postage prepaid, eight (8) true and correct copies of STATUTORY AND REGULATORY PROVISIONS AT ISSUE to:

Court Clerk
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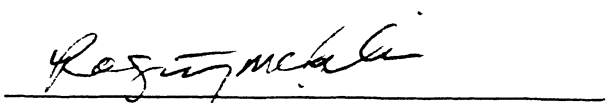

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